COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department of Telecommunications and Energy on its own Motion into the Appropriate Regulatory Plan to succeed Price Cap Regulation for Verizon New England, Inc. d/b/a Verizon Massachusetts' intrastate retail telecommunications services in the Commonwealth of Massachusetts	D.T.E. 01-31-Phase I

September 7, 2001

HEARING OFFICER RULING ON MOTION OF AT&T COMMUNICATIONS OF NEW ENGLAND, INC. FOR PROTECTIVE TREATMENT OF CONFIDENTIAL INFORMATION

I. INTRODUCTION

On August 24, 2001, AT&T Communications of New England, Inc. ("AT&T") filed with the Department of Telecommunications and Energy ("Department") the testimony of John Mayo, Anthony Fea, and Deborah S. Waldbaum. Also on August 24, 2001, AT&T filed a Motion for Protective Treatment of Confidential Information included in the testimony of Anthony Fea ("Motion for Protective Treatment"). No party filed an objection to AT&T's Motion for Protective Treatment.

II. STANDARD OF REVIEW

Information filed with the Department may be protected from public disclosure pursuant to G.L. c. 25, § 5D, which states in part that:

> The [D]epartment may protect from public disclosure, trade secrets, confidential, competitively sensitive or other proprietary information provided in the course of proceedings conducted pursuant to this chapter. There shall be a presumption that the information for which such protection is sought is public information and the burden shall be upon the proponent of such protection to prove the need for such protection. Where such a need has been found to exist, the Department shall protect only so much of the information as is necessary to meet such need.

G.L. c. 25, § 5D permits the Department, in certain narrowly defined circumstances, to grant exemptions from the general statutory mandate that all documents and data, regardless of physical form or characteristics, received by an agency of the Commonwealth are to be viewed as public records and, therefore, are to be made available for public review. See G.L. c. 66, § 10; G.L. c. 4, § 7, cl. twenty-sixth. Specifically, G.L. c. 25, § 5D, is an exemption recognized by G.L. c. 4, § 7, cl. twenty-sixth (a) ("specifically or by necessary implication exempted from disclosure by statute").

G.L. c. 25, § 5D establishes a three-part standard for determining whether, and to what extent, information filed by a party in the course of a Department proceeding may be protected from public disclosure. First, the information for which protection is sought must constitute "trade secrets, confidential, competitively sensitive or other proprietary information"; second, the party seeking protection must overcome the G.L. c. 66, § 10, statutory presumption that all such information is public information by "proving" the need for its non-disclosure; and third, even where a party proves such need, the Department may protect only so much of that information as is necessary to meet the established need and may limit the term or length of time such protection will be in effect. See G.L. c. 25, § 5D.

Previous Department applications of the standard set forth in G.L. c. 25, § 5D reflect the narrow scope of this exemption. See Boston Edison Company: Private Fuel Storage Limited Liability Corporation, D.P.U. 96-113 at 4, Hearing Officer Ruling (March 18, 1997) (exemption denied with respect to the terms and conditions of the requesting party's Limited Liability Company Agreement, notwithstanding requesting party's assertion that such terms were competitively sensitive); see also Standard of Review for Electric Contracts, D.P.U. 96-39 at 2, Letter Order (August 30, 1996) (Department will grant exemption for electricity contract prices, but "[p]roponents will face a more difficult task of overcoming the statutory presumption against the disclosure of other [contract] terms, such as the identity of the customer"); Colonial Gas Company, D.P.U. 96-18 at 4 (1996) (all requests for exemption of terms and conditions of gas supply contracts from public disclosure denied, except for those terms pertaining to pricing).

All parties are reminded that requests for protective treatment have not been and will not be granted automatically by the Department. A party's willingness to enter into a non-disclosure agreement does not resolve the question of whether the response should be granted protective treatment. Boston Electric Company, D.T.E. 97-95, Interlocutory Order on (1) Motion for Order on Burden of Proof, (2) Proposed Nondisclosure Agreement, and (3) Requests for Protective Treatment (July 2, 1998).

III. AT&T'S POSITION

In its Motion for Protective Treatment, AT&T asserts that information contained in the testimony of Anthony Fea ("Fea Testimony") is competitively sensitive, proprietary, and

confidential (Motion for Protective Treatment at 2). AT&T asserts that the Fea Testimony includes the percentage of AT&T's customers served by AT&T's own facilities (i.e., "Type I" provisioning), and the percentage of AT&T's customers served by equipment and facilities leased from other carriers (i.e., "Type II" provisioning) (id.). AT&T argues that possession of this information by competitors would provide AT&T's competitors with a significant competitive advantage because this information provides insight into AT&T's internal decision-making processes, marketing plans, and entry strategy (id.). AT&T further argues that the information it seeks to have protected from public disclosure is similar to the types of information granted protective treatment in other Department dockets (id. at 2-3).

IV. ANALYSIS AND FINDINGS

AT&T requests confidential treatment of the following: 1) the approximate percentage of its business customers provided service through Type I provisioning; 2) the approximate percentage of its business customers provided service through Type II provisioning; and 3) the approximate percentage of AT&T's Type II arrangements that include facilities and equipment obtained from Verizon. Motion for Protective Treatment at 2; Fea Testimony at 9 (Public Non-Proprietary Version). For the reasons discussed below, I conclude that AT&T has not explained fully in its Motion for Protective Treatment why public disclosure of these three approximate percentages would put AT&T at a competitive disadvantage. Therefore, AT&T has not met the statutory requirements under G.L. c. 25, § 5D, that information sought to be protected from public disclosure must constitute "trade secrets, confidential, competitively sensitive or other proprietary information," and that the moving party must prove the need for non-disclosure.

In the Fea Testimony at 9 (Public Non-Proprietary Version), AT&T states, "AT&T provides its business customers service using two distinct methods. . . . The second, and most common, provisioning method is referred to as Type II provisioning . . .." By referring to Type II provisioning as the most common of the two forms of AT&T provisioning in the public version of the Fea Testimony, AT&T has in effect disclosed that the approximate percentage of its customers provided service through Type II provisioning is some percentage greater than 50 percent (i.e., if it is the most common method, then most of AT&T's customers are served through Type II provisioning). In its Motion for Protective Treatment, AT&T does not explain why disclosure of "greater than 50 percent" is not proprietary, but a higher (but still approximate) percentage is proprietary. Conversely, AT&T does not explain in its Motion for Protective Treatment why a description of its Type I provisioning as the "less common" (i.e., some percentage less than 50 percent) form of provisioning is not proprietary, but a lower (but still approximate) percentage is proprietary. Likewise, in its public version of the Fea Testimony at 9, AT&T states that Type II provisioning "includes the use of equipment and facilities leased, at least in part, from another carrier, *predominantly from Verizon*." (Emphasis added). AT&T later refers to the use of Verizon facilities for provisioning as "the only game in town." Id. AT&T does not explain in its Motion for Protective Treatment why the fact that

AT&T predominantly leases equipment and facilities from Verizon for its Type II arrangements is not proprietary, but an approximate percentage of the equipment and facilities leased from Verizon in AT&T's Type II arrangements is proprietary. It is unclear from AT&T's Motion for Protective Treatment why public disclosure of the approximate percentages AT&T seeks to have protected would shed any more light on AT&T's internal decision-making processes, marketing plans, and entry strategies, than the information already provided in the public version of the Fea Testimony. Under the applicable statute, parties must prove the need for non-disclosure of the information they seek to have protected. Proof of this nature necessarily includes an explanation of how the information would or could be used by competitors to the moving party's disadvantage if the information were disclosed. AT&T has not made such a showing in its Motion for Protective Treatment.

V. RULING

AT&T's Motion for Protective Treatment is denied.

Under the provisions of 220 C.M.R. § 1.06(6)(d)(3), any party may appeal this Ruling to the Commission by filing a written appeal with supporting documentation within five (5) days of this Ruling. Any appeal must include a copy of this Ruling.

Date: September 7, 2001 _____/s/_____
Paula Foley, Hearing Officer